90-612

(1)

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NORMAN S. ADAMS, *et al.*,
Petitioners,

vs.

AVONDALE INDUSTRIES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID S. MANN
Counsel of Record for Petitioners
TALIAFERRO & MANN
133 W. Fourth Street, Suite 600
Cincinnati, Ohio 45202
(513) 241-6200

DOUGLAS M. MOREHART
TALIAFERRO & MANN
133 W. Fourth Street, Suite 600
Cincinnati, Ohio 45202
(513) 241-6200

St. Louis Law Printing Co., Inc., 13307 Manchester Road 63131 314-231-4477

QUESTIONS PRESENTED

With respect to an unwritten severance pay plan that is subject to the Employee Retirement Income Security Act ("ERISA"):

1. On the eve of the event that requires severance payments, may the plan be amended by the employer in order to avoid paying the benefits if, in violation of ERISA, the plan fails to provide a procedure for amending the plan?

2. If the plan may be amended, what standard of judicial review applies to the amendment? In this regard:

    (a) May the *de novo* review required of a plan interpretation under *Firestone Tire & Rubber Co. v. Bruch,* 109 S.Ct. 948 (1989), be avoided through the device of characterizing a plan interpretation as a plan amendment?

    (b) Does *Bruch* apply to a benefit denial resulting from a plan amendment or other action that is not a plan interpretation?

PARTIES TO THE PROCEEDINGS

This litigation was brought by forty former salaried employees of respondent Avondale Industries, Inc. One of the original plaintiffs chose not to be party to the appeal to the Sixth Circuit. Two of the appellants decided not to be party to this petition. The petitioners are, therefore, these thirty-seven persons: Norman S. Adams, Edward A. Bickers, Dennis E. Calvert, Julia Conover, James E. Cook, Jerry F. Crowell, Clell Delk, Joseph E. Denham, Donald R. Edwards, Gary Eglian, Don Elders, Edward Elders, Lawrence J. Fehr, Alan M. Geisler, Barry T. Glass, Lowell Wayne Hacker, James W. Herrmann, John C. Herzog, Jerry Johnson, Johnny E. Jones, Homer R. Jump, Melvin R. Keitz, Carol J. Leifling, Robert E. Molloy, Ellsworth Miller Roberts, Jr., Mark M. Roflow, Gerald E. Schmidt, Charles Schwindt, Lawrence M. Sedan, Mark Spicer, Linda K. Temke, Paul G. Toms, Debra Rae Turner, Wendell J. Walker, Jan G. Warren, Luke D. Warren, Robert Wood

The respondents are Avondale Industries, Inc., Connell Industries, Inc. and Connell Limited Partnership. After the events giving rise to this litigation, in a separate and unrelated transaction, Connell Industries, Inc. and Connell Limited Partnership purchased many of the assets of Avondale Industries, Inc. As has been the practice throughout this litigation, all three respondents are collectively referred to as "Avondale," "defendant" or "respondent."

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit. This judgment involves significant questions under the Employee Retirement Income Security Act of 1974 ("ERISA").

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio (A23 - A36) which granted respondents' motion for summary judgment as to severance pay is reported at 712 F.Supp. 1291 (S.D. Ohio 1989). The opinion of the United States Court of Appeals for the Sixth Circuit (A1 -A22), which affirmed the district court as to severance pay, is

reported at 905 F.2d 943 (6th Cir. 1990). While both opinions also involved vacation pay claims, this Petition concerns only severance pay.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1990. By Order of August 31, 1990, the petitioners were granted until October 12, 1990, to file the petition for writ of certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 402(b)(3) of ERISA, 29 U.S.C. §1102(b)(3), requires that every employee benefit plan shall provide a procedure for amending the plan.

Section 402(a)(1) of ERISA, 29 U.S.C. §1102(a)(1), also requires that employee benefit plans be established and maintained pursuant to a written instrument. Under Section 102 of ERISA, 29 U.S.C. §1022, a summary plan description of each employee benefit plan shall be furnished to each participant of the plan. The summary plan description is required to apprise each participant of his or her rights and obligations under the plan. It must contain detailed information as specified in a long listing in the statute.

These statutory provisions are set forth in the Appendix (A37 - A43).

STATEMENT OF THE CASE

1. Introduction.

On November 19, 1986, respondent Avondale Industries, Inc. ("Avondale") entered into a Purchase and Sale Agreement providing for the sale of the assets of its Ortner Freight Car Division ("Ortner") to Trinity Industries, Inc. ("Trinity"). The

closing on the sale occurred on January 16, 1987, with the conveyance of Ortner assets by deed, bill of sale and other instruments as provided in the Purchase and Sale Agreement. This assets sale terminated the petitioners as salaried employees of Avondale and, under Avondale's *unwritten* severance pay plan, severance payments should then have been distributed to them.

In the meantime, however, Avondale learned how expensive the severance payments were going to be and attempted to eliminate any severance obligation to petitioners. With less than two weeks to go before the closing and even though, in violation of ERISA, the severance plan did not provide a procedure for amendment, Avondale composed a so-called Limited Severance Plan ("LSP"). Relying upon the LSP, Avondale withheld severance pay from the petitioners because they were hired by Trinity.

Before the District Court, Avondale argued, alternatively, that the LSP was (1) an interpretation *or* (2) an amendment of Avondale's severance plan. The District Court would not approve the argument of Avondale that it was free to amend the plan "on the eve of the Ortner sale" (A28). The District Court did find that the LSP was a valid *interpretation* of the severance plan and that Avondale could withhold severance payments from petitioners. The United States Court of Appeals for the Sixth Circuit did not decide whether it agreed with the District Court that the LSP was a proper interpretation of the severance plan but noted various problems with the District Court's reasoning and conclusions (A13 - A14 & n.3). Instead, the Sixth Circuit concluded that the LSP was an effective *amendment* to Avondale's severance plan and that, under the plan as amended, the petitioners were not entitled to severance pay.

2. The Avondale Severance Plan.

The terms of the previously existing *unwritten* severance pay plan are stipulated to be as follows:

> Eligible salaried employees were entitled to one week of current salary for each year of service with Ortner with a minimum of two weeks and a maximum of eight weeks. Eligible salaried employees were those who were *involuntarily terminated from service with* Defendant *Avondale*. Persons who resigned, retired or were fired for gross misconduct were not eligible for severance benefits. (emphasis added)

Under the plan, an employee who was "involuntarily terminated" from service with *Avondale* was to receive severance pay based on years of service and current salary level. Benefits were not contingent upon a period of unemployment and terminated employees who immediately joined other companies nevertheless received severance pay from Avondale. *No power to amend or modify the plan was reserved by Avondale.*

In violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), Avondale had failed to reduce the severance plan to writing, to file annual reports on the plan or to distribute a summary plan description of the severance program to Avondale employees, including petitioners (A33). Nor did the plan comply with the ERISA requirement to "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. §1102(b)(3) (A43).

3. The Assets Sale by Avondale to Trinity.

The lengthy (45 page) Purchase and Sale Agreement between Avondale and Trinity did not protect the jobs or benefits of the petitioners. Trinity decided, one-by-one, whether to hire former employees of Avondale. A separate decision was made as to each petitioner, each of whom was offered and accepted employment with Trinity. Trinity does *not* have a severance pay plan, however, and Ortner employees who joined Trinity do *not* receive severance pay if subsequently terminated from service with Trinity.

With the execution of the Purchase and Sale Agreement on November 19, 1986, the only thing remaining before Avondale was required to make severance payments to the petitioners was the passage of time until the January 16, 1987, closing of the sale. Upon the closing, petitioners ceased to be employed by Avondale and, in the words of the severance plan, became "involuntarily terminated from service" with Avondale.

4. The "Limited Severance Plan" (LSP).

Between the date on which the Agreement was signed and the closing date, Avondale developed cost estimates of its severance pay obligations to Ortner employees, including the petitioners (A5). With these estimates in hand and the closing on the assets sale to Trinity less than two weeks away, Avondale wrote out the LSP. In relevant part, the LSP reads as follows:

> This memorandum is written to inform you of the arrangements made for you concerning your severance....
>
> Employees not employed by Trinity, employees not accepting employment with Trinity and employees retained by Trinity during the completion of the current production run and then terminated will be eligible for severance pay based on the following formula....

The LSP does not mention the previously existing, unwritten severance plan and is *not* identified in any way as an amendment, modification or interpretation thereto. The LSP is also silent about employees like the petitioners who might join Trinity after the closing. Avondale nevertheless claims that the LSP denies severance benefits to the petitioners.

5. Proceedings Below.

Petitioners filed suit in federal district court. Federal jurisdiction is based on ERISA, 29 U.S.C. §1132, and Title 28 U.S.C. §1331.

A. District Court

On cross motions for summary judgment before the District Court, Avondale claimed that the LSP relieved Avondale of any obligation to pay severance benefits. Avondale argued alternative positions: (a) the LSP modified and/or replaced the severance pay plan under which petitioners claim *or* (b) the LSP was a valid interpretation of the severance pay plan. Petitioners argued that (a) the LSP could not pass muster under the *de novo* review required by *Firestone Tire & Rubber Co. v. Bruch*, 109 S.Ct. 948 (1989); (b) the *Bruch* review standard for plan interpretation cannot be avoided by mischaracterizing a plan interpretation as a plan amendment; (c) amendment is not proper where no power to amend has been reserved; (d) any power to amend is subject to principled review under the *Bruch* charge for the federal courts to develop a "'federal common law of rights and obligations under ERISA-regulated plans.'" *Bruch*, 109 S.Ct. at 954 (quoting from *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)); and (e) under ERISA, contract law and trust principles are available to review plan amendments. Petitioners' Memorandum in Support of Motion for Summmary Judgment at 38-43; Petitioners' Reply Memorandum in Support of Motion for Summary Judgment at 21-31.

The District Court refused to embrace Avondale's argument that "an employer is free to amend or terminate a benefit plan under any circumstance irrespective of its employees' welfare" (A28). The District Court assumed, *arguendo*, that the respondents acted improperly in amending or terminating the severance plan "on the eve of the Ortner sale" (A28). The District Court nevertheless upheld the LSP as a valid *interpretation* of the severance pay plan. While purporting to apply the *Bruch de novo* standard of review, the District Court employed several factors which the Sixth Circuit noted were better suited for the pre-*Bruch* arbitrary and capricious standard of review (A13 & n.3 - A14). The Sixth Circuit also noted the cases, before and after *Bruch*, that find an assets sale to work a ter-

mination for severance pay purposes, even where an employee is hired by the buyer of the assets. *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495 (11th Cir. 1987); *Ulmer v. Harsco Corp.*, 884 F.2d 98 (3rd Cir. 1989). (A13 & n.3).

B. Court of Appeals

On petitioners' appeal, the Sixth Circuit dealt with the LSP, not as a plan interpretation, but rather as a plan amendment. The petitioners once more argued that (a) the LSP cannot accurately be characterized as a plan amendment — it is an interpretation subject to *Bruch de novo* review; (b) no power to amend had been reserved by the respondents; and (c) the exercise of a right to amend is subject to judicial review including, (d) under contract and trust principles. Petitioners' Reply Brief at 9-19.

The Sixth Circuit made three determinations in holding that the petitioners were not entitled to severance payments. First, despite Avondale's failure to reserve a right to amend the plan in violation of ERISA, 29 U.S.C. §1102(b), the LSP was an effective amendment. Second, Avondale did not act in a fiduciary capacity when it decided to amend the plan and was therefore not subject to ERISA's fiduciary duties of care and loyalty. Third, *Bruch* is limited to benefit denials based on plan interpretations; it does not apply to benefit denials resulting from plan amendments (A12 - A13).

The Court did *not* address three arguments presented by the petitioners in their briefs: (1) plan amendments are subject to judicial review under the *Bruch*-mandated federal common law for ERISA-regulated plans; (2) contract and trust principles should be drawn upon in the development of federal common law; and (3) *Bruch* may not be avoided through inaccurately characterizing a plan interpretation as a plan amendment.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

This case has been inevitable since *Firestone Tire & Rubber Co. v. Bruch*, 109 S.Ct. 948 (1989). In both cases, an employer sold the assets of a business and denied severance pay to employees hired by the buyer of the assets. In *Bruch*, this Court held that the denial of severance benefits, based on an *interpretation* of the severance pay plan, was subject to *de novo* judicial review in an action under 29 U.S.C. §1132(a)(1)(B). This case has a new twist: *after* the litigation began, the employer, Avondale, dressed up the plan interpretation, called it an *amendment* and then claimed that a plan amendment is not subject to *Bruch*. The question remains the same, however: by what standard shall a denial of severance pay be reviewed? The related question is whether a welfare benefit plan may even be amended if a procedure for amending the plan is not set forth in the plan as required by ERISA.

In 1988, forty-two percent of the 31.1 million employees working for this nation's large and medium sized employers were covered by severance pay plans.[1] In addition, of course, employers of all sizes provide many other kinds of ERISA-regulated welfare benefit plans for millions more of this country's workers. 29 U.S.C. §1001. Beyond doubt, employees provide services with the expectation that benefits will be paid in accordance with the terms of these plans.

Under the Sixth Circuit's decision in this case, however, an employer may wait until just a few days before an event which will trigger payment of the severance or other welfare benefit, amend the plan, and deny employees the benefits to which they

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[1] United States Department of Labor, Bureau of Labor Statistics, Employee Benefits in Medium and Large Firms, 1988, Bulletin 2336 (1989) at iii, 118.

are entitled. According to the Sixth Circuit, it does not matter that the employer has violated ERISA by not putting the plan in writing and by not including a procedure for amendment in the plan. Nor does it matter that the amendment takes place only after the employer has calculated the costs of paying severance or other benefits, that the amendment document does not state in any way that it is an amendment or modification, or that the supposed amendment can more accurately be described as a plan interpretation than as a plan amendment.

The import of the Sixth Circuit's decision is that plan amendments are not subject to judicial review and that less protection is afforded "to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Bruch*, 109 S.Ct. at 956. This cannot have been the intent of Congress in enacting ERISA. ERISA was meant to improve the security of workers in their benefit programs, 29 U.S.C. §1001, not to leave them subject to the arbitrary, nonreviewable power of an employer, through the device of an "amendment," to strip away benefits on the eve of the event requiring payment.

As discussed in subsequent sections, several Circuits have been struggling with these very problems and the Supreme Court's direction at this juncture would be very useful to the sensible, uniform development of ERISA and the benefits protected thereunder. Even now, the Second Circuit has before it *Reichelt v. Emhart Corp.*, No. 90-7400 (2d Cir. filed April 23, 1990), a case in which the district court held that ERISA does not bar a plan amendment eliminating severance pay in connection with the sale of a plant. *In Re Emhart Corporation*, No. N-86-510 (D. Conn. Feb. 16, 1990).

II. BENEFITS MAY NOT BE STRIPPED AWAY THROUGH AN AMENDMENT TO A PLAN WHICH, IN VIOLATION OF ERISA, DOES NOT CONTAIN A PROCEDURE FOR AMENDING THE PLAN.

ERISA requires each plan to be in writing and set forth an amendment procedure, 29 U.S.C. §1102:

§1102. **Establishment of plan**

(a) **Named fiduciaries**

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument....

(b) **Requisite features of plan**

Every employee benefit plan shall — ...

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan,

(c) **Optional features of plan ...**

Subsections (b) and (c) of section 1102 distinguish, respectively, between "requisite" features of a plan and "optional" features. The requirement for an amendment procedure is in subsection (b), the *mandatory* portion of section 1102. Nevertheless, the unwritten severance pay plan of Avondale did *not* reserve any power or provide any procedure for amending the plan.

The Sixth Circuit disposed of the requirement for an amendment procedure in two ways. First, according to the panel, the absence of an amendment provision is a mere "procedural" violation which does not provide a substantive remedy to empoyees whose benefits have been denied (A13). Second, the panel makes the surprising assertion that the petitioners "failed

to show any detrimental reliance based on defendant's [respondent's] failure to comply with section 1102(b)" (A13). The panel is wrong on these two points for the reasons developed in separate sections below. Initially, however, the far-reaching, adverse effects of this case must be noted.

The damage to ERISA plans from the Sixth Circuit's decision can hardly be overstated. This case appears to be the first express holding by a Circuit Court that a power to amend need not have been reserved in order for an employer to amend its welfare benefit plan, even if the immediate result is to strip away benefits otherwise about to be payable. The Sixth Circuit previously had relied on the employer's reservation of a right to amend the plan in question. *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1745 (1989); *In Re White Farm Equipment Co.*, 788 F.2d 1186 (6th Cir. 1986). This case thus could have enormous impact on the worth to employees of this nation's welfare benefit plans.

Three times the Third Circuit has articulated, but not answered, the question whether an amendment can be effective if the power to amend has not been provided or reserved. *Frank v. Colt Industries, Inc.*, 910 F.2d 90, 98 (3rd Cir. 1990); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 & 1163 n.9 (3rd Cir. 1990); and *Flick v. Borg-Warner Corp.*, 892 F.2d 285, 287 (3rd Cir. 1989). Most recently, in *Frank*, the Third Circuit said:

> Here, the Severance Plan violated ERISA by failing to set forth an amendment procedure. Arguably, the benefit provisions of such a plan cannot be amended unless and until an amendment procedure is added to the plan and complied with. *Frank*, 910 F.2d at 98.

Judge Becker's separate opinion in *Flick* (concurring in part and dissenting in part) frames the issue very nicely:

> *This case*, however, *involves an amendment* that was applicable to then-current employees, effective as soon as it

was announced, and *intentionally designed to foreclose claims for benefits* that might otherwise have arisen less than three months after the adoption of the amendment. *Under these circumstances,* I believe that *an employer's unilateral decision to amend* a severance plan *is invalid unless a unilateral amendment power was expressly reserved in the plan itself. Flick*, 892 F.2d at 291 n.9 (emphasis added).

A. The Failure To Provide a Method for Amending the Plan Is More Than Just a "Procedural" Violation.

The absence of a provision for the amendment of the plan can hardly be treated as *mere* procedure. As the Eleventh Circuit has said: "By explicitly requiring that each plan specify the amendment procedures, Congress *rejected* the use of informal written agreements to modify an ERISA plan." *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) (emphasis added).

Unlike rules about providing a summary plan description or filing annual reports, the presence or absence of an amendment procedure concerns a *term* of the plan. Either the plan provides a method for amendment or it does not. If a procedure is provided, it is a part of the plan itself and any alleged amendment must be tested against the amendment procedure in the plan. *Frank v. Colt Industries, Inc.*, 910 F.2d 90, 98 (3rd Cir. 1990). An amendment procedure can assume many forms with many different substantive variations. An amendment procedure can, for example, define which terms of the plan are subject to amendment, by whom, by what steps, with what notice and with what participation by those covered by the plan. An amendment procedure is clearly a substantive provision of a plan. In the end, just like the author of any legal instrument, Avondale must accept responsibility for the *absence* of the required amendment procedure, a responsibility that cannot be escaped by calling the requirement merely "procedural."

Trust law is a helpful reference in judging the weight to be attached to the requirement that an amendment procedure be pro-

vided in the plan. *Bruch* notes that "ERISA abounds with the language and terminology of trust law." *Bruch*, 109 S.Ct. at 954. Trust law provides an *exact* parallel to the ERISA rule: "*the settlor cannot modify* the trust if by the terms of the trust he did not reserve a power of modification." RESTATEMENT (SECOND) OF TRUSTS §331 (1959) (emphasis added). Given this clear principle of trust law, ERISA must be taken to prohibit an amendment where no power to amend or modify has been reserved.

Finally, there is a practical question about achieving compliance with the ERISA mandate that an amendment procedure be provided in a plan. If an amendment can be effective in the absence of the required plan provision, no incentive whatever exists for an employer to meet the ERISA requirement.

B. Any "Detrimental Reliance" Requirement Has Been Satisfied under the Facts and Circumstances of This Case.

Petitioners worked for Avondale, some for decades, and the Court may "presume reliance from continued employment." *Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1128 (7th Cir. 1990). The benefits at Avondale included a severance pay plan in which Avondale reserved no power to amend. Petitioners had every right to rely on the terms of the plan and on the basic statutory provisions of ERISA and to assume that these terms and requirements would not blithely be ignored by their employer.

Once their severance entitlements were imminently payable, with no contingencies other than the passage of a few additional days until the closing of the assets sale, the petitioners were entitled to beieve that those payments would not and could not be stripped away through the unilateral exercise by the respondent of a new found power to amend. The attempt of Avondale to take away their benefits provides all the detriment that the petitioners need to show, particularly where Avondale's motivation was so clearly to save itself from the $170,000 in severance benefits that it estimated were payable to the petitioners.

In sum, the LSP should be denied effect because the plan fails to meet the ERISA requirement that the power to amend be reserved.

III. UNDER ERISA, THE ALLEGED AMENDMENT IS SUBJECT TO PRINCIPLED JUDICIAL REVIEW UNDER WHICH PETITIONERS CANNOT BE DENIED THEIR SEVERANCE PAY.

A. Introduction.

If, contrary to petitioners' belief, a severance plan may be amended under the facts of this case, a second question must be addressed. By what standard of review is the decision to amend to be tested?

The effect of the Sixth Circuit's decision, if it is allowed to stand, is that a plan amendment is subject to *no* judicial review whatever. The Sixth Circuit reached two conclusions. First, the panel held that the amendment decision was not subject to ERISA's fiduciary duties of care and loyalty that govern the administration of a benefit plan. According to the Sixth Circuit, these duties do not apply to the decision "to amend or terminate a welfare benefits plan" (A8). Second, the panel held that *Bruch* is not a substantive basis for judicial review of a plan amendment. According to the panel, *Bruch* limited itself to "§1132(a)(1)(B) actions challenging denials of benefits based on plan *interpretations*" (A13) (emphasis added).

The Sixth Circuit's opinion then ends. The opinion does not take up *two further contentions of the petitioners* under the *Bruch* obligation to develop a '"federal common law of rights and obligations under ERISA-regulated plans."' *Bruch*, 109 S.Ct. at 954 (quoting from *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)). First, petitioners argued that Avondale may not avoid the *Bruch de novo* review of a benefit denial by characterizing a plan interpretation as a plan amendment. Second, even if the benefit denials suffered by the petitioners had

resulted from a bona fide plan amendment, the employer's actions remain subject to judicial review including under contract and trust principles. Petitioners' Reply Brief at 9-19.

B. The Gambit of Improperly Characterizing a Plan Interpretation as a Plan Amendment Must Be Rejected as an Attempt to Avoid *Bruch*.

Without dispute, *Bruch* at least governs benefit denials based on plan *interpretation*. If the LSP is an interpretation, *Bruch* applies to it and the dispositive question for *de novo* review by the federal courts is simply whether the petitioners suffered an "involuntary termination from service" with Avondale because of the assets sale. And, as the Sixth Circuit noted, a fair amount of authority holds that an "involuntary termination" occurs upon an assets sale (A13 & n3).

Avondale's "characterization" gambit must be rejected. If the LSP, dreamed up only on the *eve* of the closing, can *completely* avoid *Bruch*, it is hard to think of any question of plan administration that could not, in a similar fashion, be characterized as a plan amendment. The real issue for Avondale, after all, was one of plan interpretation — did the involuntary termination from service with Avondale that was caused by the assets sale include those employees who happened to be hired by Trinity? The so-called amendment addressed this precise question — shall the plan be amended to withhold severance benefits from anyone accepting a job with Trinity? By the same technique, virtually any issue requiring a decision by the plan administrator can be recast as an amendment. Under the Sixth Circuit's decision, employers can simply dangle fringe benefits in front of employees, enticing and inducing them to work, and then, when it comes time to pay up, unilaterally "amend" away any obligation to pay the benefits.

There are at least three other reasons why the LSP is not an amendment and must, therefore, be considered to be an interpretation subject to *Bruch*. First, nowhere in the LSP is there

any indication, or even a hint, that the LSP was intended to amend the existing plan or to deal with the petitioners. The LSP is silent about employees like the petitioners who might join Trinity after the closing. The severance plan supposedly being amended is not mentioned, not even once. Words like "amendment," "modification," or "change" are never used. Only later, after suit began, did Avondale argue, alternatively, that the LSP was an amendment.

Second, remember the reason the LSP was drafted. As *Frank v. Colt Industries, Inc.*, 910 F.2d 90 (3rd Cir. 1990), notes, there is a "fundamental difference" between an action intended to amend a plan and an action intended to construe or interpret a plan. Avondale did not decide one day to think about the severance plan and whether, as a matter of sound business judgment, its terms should be changed for the future. As Avondale admits in its Brief before the Sixth Circuit, Respondent's Brief at 13-14, the question at hand was the assets sale to Trinity and what to do under the severance pay plan. This question was anwered with the LSP. *A decision reached with specific reference to a particular, imminent transaction should be classified as an interpretation* particularly where the decision-maker argues, albeit alternatively, that the LSP is, in fact, an interpretation.

Third, under ERISA, the LSP does not pass muster as an amendment. Even where the power to amend has been properly reserved in writing, the Circuits have rejected "informal" documents, i.e., documents other than a summary plan description, as *not* being effective to work an amendment. In *Alday v. Container Corp. of America*, 906 F.2d 660, 666 (11th Cir. 1990), the former employees who claimed health benefits relied upon a Booklet — "Summary of Personal Benefits" — distributed each year to the employees. Citing its earlier decision in *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986), the Eleventh Circuit held that the Booklet did not change or modify the plan's terms. The plan was defined *only* by the plan

document itself and by the summary plan description required under ERISA to be given to all participants. Similarly, in *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988), the Second Circuit rejected the argument that a booklet and other writings could work an amendment. The booklet failed as a "formal" plan document because it did not meet the requirements for a summary plan description as set forth at 29 U.S.C. §1022. Just like these booklets, the LSP falls far short of providing the detailed information required of a summary plan description.

Alday and *Moore* involved an attempt by employees and beneficiaries to *increase* the benefits from a plan. Where the claimed amendment is pressed by the employer and would *eliminate* benefits, even less deviation from the ERISA requirements for a summary plan description should be accepted. *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1163 (3rd Cir. 1990).

The Sixth Circuit's deference to Avondale's characterization is improper. This very characterization of an interpretation as an amendment must be subject to review if *Bruch* is to have any continuing force or effect.

C. The Plan Amendment Is Subject to Federal Judicial Review and, upon Review, Is Not Effective To Deny Benefits to the Petitioners.

The Sixth Circuit distinguishes between the role of an employer as a plan administrator and as a business decision-maker. According to the panel, ERISA oversight applies to the decision of a plan administrator but not to "day-to-day corporate business transactions, which may have a collateral effect on prospective, contingent employee benefits" or which involve an "unfunded contingent benefit plan" (A7). According to the Sixth Circuit, the decision to amend or terminate a welfare benefits plan is not a decision made in a fiduciary capacity subject to ERISA. To hold differently, says the panel, would be to

add a "vested right to welfare benefits" contrary to the decision of Congress (A8).

The answer to all of this is the clear difference between what Avondale did in express contemplation of an imminent obligation to make substantial one time payments and the more general case of an employer that wishes to change some of its benefit programs on a prospective basis. The petitioners' benefits were hardly "prospective, contingent employee benefits." They were due to be paid in a matter of days in a known, large amount that could be avoided only by the extraordinary maneuvers dreamed up by Avondale. At least one court has dealt directly with the issue and fashioned a very sensible rule: an amendment "is not permissible when made expressly in contemplation of actions which would otherwise entitle employees to the previously provided benefits." *Dependahl v. Falstaff Brewing Corp.*, 491 F.Supp. 1188, 1197 (E.D. Mo. 1980) modified on other grounds, 653 F.2d 1208 (8th Cir.) *cert. denied*, 454 U.S. 968 (1981). If *Bruch* is to continue to have any meaning, this Court must decide that Avondale's actions are subject to principled judicial review.

The panel adopts a very, very narrow reading of *Bruch*. This case is brought, just like *Bruch*, under §1132(a)(1)(B) and, just like *Bruch*, involves a denial of benefits in connection with the sale of a plant. *Bruch* nowhere says that benefit denials based on something other than a plan interpretation are free of principled judicial review. On the contrary, the *Bruch* holding is broadly stated:

> Consistent with established principles of trust law, we hold that a *denial of benefits* challenged under *§1132(a)(1)(B) is to be reviewed under a de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. *Bruch*, 109 S.Ct. at 956 (emphasis added).

The Seventh Circuit just recently (August 20, 1990) focused on this language in supporting a broad view of *Bruch, Petrilli v. Drechsel,* No. 89-3170 (7th Cir. Aug. 20, 1990) to be reported at 910 F.2d 1441:

> This later recitation of the holding strongly suggests that the Court intended de novo review to be mandatory where administrators were not granted discretion, *regardless of whether the denials under review were based on plan interpretations.* If this were not the intent, the Court could simply have omitted the words "to determine eligibility for benefits," from the above-quoted holding and confined the "unless" clause to "unless the benefit plan gives the administrator or fiduciary discretionary authority to construe the terms of the plan." Finally, *the rationale supporting* the Court's adoption of *de novo review provides no basis for discriminating between denials based on plan interpretations and denials for other reasons.* By analogy to trust law, the rationale focuses on whether the written terms of the plan confer discretion on the administrator, and not on the type of decision—factual or interpretive—that the administrator is rendering. *Petrilli,* Slip Op. at 9-10 (emphasis added).

Bruch emphasized that the benefit plan under review did *not give discretionary authority* to the administrator or fiduciary to interpret the plan or determine eligiblity for benefits. This *lack* of such authority was the reason that *de novo* judicial review was appropriate. Just as the employer in *Bruch* failed to reserve any power to construe the plan or make eligibility determinations, Avondale reserved no power to amend. Therefore, any attempt to amend must similarly be subject to *de novo* judicial review.

Under *Bruch,,* the federal courts are to develop a " 'federal common law of rights and obligations under ERISA-regulated plans.' " *Bruch,* 109 S.Ct. at 954 (quoting from *Pilot Life Ins.*

Co. v. Dedeaux, 481 U.S. 41, 56 (1987)). *Bruch* turned to contract and trust principles and they offer a source of rules for judging plan amendments.

As to trust principles, Judge Becker notes in his excellent opinion (concurring in part and dissenting in part) in *Flick v. Borg-Warner Corp.,* 892 F.2d 285, 291 (3rd Cir. 1990), that " 'the settlor cannot modify the trust if by the terms of the trust he did not reserve a power of modification' " (quoting from RESTATEMENT (SECOND) OF TRUSTS §331 (1959)). Under trust law, then, Avondale did not have the power to amend the plan and avoid payment to the petitioners. Note the exact parallel between this principle of trust law and the ERISA mandate that an amendment procedure be provided in each plan. This simply confirms the correctness of referring to trust law principles in general and to section 331 of the Restatement (Second) of Trusts in particular.

As to contract law, petitioners claim under a unilateral contract theory. They worked under a severance plan which, without qualification or reservation of a right to amend, provided for benefits upon involuntary termination of service from Avondale. By providing services with this plan in effect, petitioners accepted this offer of Avondale and created a contract. RESTATEMENT (SECOND) OF CONTRACTS §50 (1979). Once accepted, a critical term of the contract, the conditions under which severance benefits were payable, could not be unilaterally modified by just one party to the agreement, certainly not when benefits were about to be payable and certainly not without the reservation by Avondale of a power to amend. 1 CORBIN ON CONTRACTS §63 (1963); *Flick,* 892 F.2d at 292 (separate opinion of Becker, J.). This position is supported by Ohio law. *Bolling v. Clevepak Corp.,* 20 Ohio App.3d 113, 121, 484 N.E.2d 1367, 1375-1376 (Erie Cty. 1984); *Helle v. Landmark, Inc.,* 15 Ohio App.3d 1, 472 N.E. 2d 765 (Lucas Cty. 1984). Avondale's actions also violate the implied covenants of "good faith and fair-dealing" to which Avondale

was subject. RESTATEMENT (SECOND) OF CONTRACTS §205 (1979); *Misco, Inc. v. United States Steel Corp.*, 784 F.2d 198, 203 (6th Cir. 1986).

This brief exposition of contract and trust principles is presented only by way of example. If this Petition is granted, more exhaustive analysis can be developed. *See* Note, *The Failure of Free Contract in the Context of Employer-Sponsored Retiree Welfare Benefits: Moving Towards a Solution*, 25 Harv. J. on Legis. 213, 232-234 (1988), for a discussion of contract theories under ERISA. The point is that *Bruch* requires the courts to develop federal common law in a meaningful way that is sensitive to the purposes of ERISA. This case offers the opportunity to further develop the standards for federal judicial review of ERISA plans.

CONCLUSION

The questions presented in this case affect millions of employees who believe they are covered under any number of welfare benefit plans. Under the Sixth Circuit's reasoning, each of these plans can be "amended" on the eve of required payments and payments thereby avoided. No right to amend need have been reserved, even though ERISA requires such a procedure for amendment. The decision to amend the plan is not subject to judicial review even if the plan amendment is actually a plan interpretation. ERISA was intended to have quite an opposite result and this Court's review can offer needed direction to the courts as they meet the *Bruch* mandate to develop federal common law under ERISA.

Respectfully submitted,

David S. Mann
Counsel of Record for Petitioners
TALIAFERRO & MANN
133 West Fourth Street, Suite 600
Cincinnati, OH 45202
(513) 241-6200

Douglas M. Morehart
TALIAFERRO & MANN
133 West Fourth Street
Suite 600
Cincinnati, OH 45202
(513) 241-6200

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-3634

Norman S. Adams, et al.,
Plaintiffs-Appellants,

v.

Avondale Industries, Inc.;
Connell Industries, Inc.;
Connell Limited Partnership,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio.

Decided and Filed June 15, 1990

Before: GUY and BOGGS, Circuit Judges; and COHN, District Judge.*

GUY, Circuit Judge. Plaintiffs, 40 salaried employees of the Ortner Freight Car Facility in Mount Orab, Ohio, appeal the district court's grant of summary judgment on their claim against Avondale Industries, Inc.,[1] the former owner of the Ortner facility. The claim arose from Avondale's sale of Ortner to a third party, Trinity Industries, Inc., and Avondale's subsequent refusal to pay either accrued vacation pay or severance

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* The Honorable Avern Cohn, United States District Court for the Eastern District of Michigan, sitting by designation.

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[1] After the events giving rise to this litigation, in a separate and unrelated transaction, defendants Connell Industries, Inc., and Connell Limited Partnership purchased many of Avondale's assets. For the sake of clarity, defendants will be collectively referred to herein as "Avondale" or "defendant."

benefits to the employees who remained at the facility. Finding that before the sale Avondale had amended its severance plan to deprive the plaintiffs of benefits, we affirm the district court's refusal to award severance benefits. Because we find that the defendant's obligation to pay vacation pay had vested before the sale and has not been subsequently discharged, however, we reverse on the second claim of error.

I.

From the time of its formation in September 1985, Avondale Industries maintained an unwritten policy of providing salaried employees at its Ortner Freight Car Division with severance benefits upon the involuntary termination of their employment. In January of 1987, Avondale sold all assets of the Ortner division to Trinity Industries, a wholly unrelated entity. Shortly before the sale, Avondale promulgated a Limited Severance Plan, amending its unwritten plan so as to deny severance pay to salaried employees who remained employed at the Ortner division after the sale of assets. Avondale then refused to pay severance benefits to Ortner's salaried employees who joined Trinity, contending that the sale did not trigger such payment according to the terms of either the original or the amended plan. Avondale also refused to pay plaintiffs vacation benefits that had vested according to the terms of Avondale's vacation plan on the grounds that Trinity had already assumed and discharged this obligation at Avondale's request.

The plaintiffs brought an action in the United States District Court for the Southern District of Ohio under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. § 1132(a)(1)(B)(1982), to recover benefits allegedly due under the unwritten severance plan and the vacation pay plan. Upon the close of discovery, the parties filed cross-motions for summary judgment. Plaintiffs argued that they were entitled to payment under the terms of the unwritten severance plan because they were "involuntarily terminated"

within the meaning of the plan. They contended that the Limited Severance Plan was ineffective as an amendment of the unwritten plan because it was promulaged in a bad-faith attempt to avoid paying promised benefits. Avondale countered by arguing, *inter alia,* that the Limited Severance Plan was a valid amendment, and that in any case the sale did not constitute a termination within the meaning of the unwritten plan.

In an opinion reported at 712 F.Supp. 1291 (S.D. Ohio 1989), the district court granted the defendant's motion for summary judgment on the severance pay claim. After correctly announcing that an administrator's interpretation of an employee benefits plan under 29 U.S.C. § 1132(a)(1)(B) must be reviewed *de novo, Firestone Tire and Rubber Co. v. Bruch,* ____ U.S. ____, 109 S.Ct. 948, 956 (1989), the court determined that Avondale's Limited Severance Plan withstood "judicial scrutiny as a valid interpretation of the unwritten severance plan." *Avondale,* 712 F.Supp. at 1295. In light of this holding, the court declined to address defendant's argument that the Limited Severance Plan effected a valid amendment of the unwritten plan.

The district court then reviewed Avondale's refusal to pay the plaintiffs accrued vacation benefits, applying state law in reliance upon the Supreme Court's recent decision in *Massachusetts v. Morash,* ____ U.S. ____, 109 S.Ct 1668, 1672-73 (1989) (ERISA does not govern disbursement of unfunded vacation payments from a single employer's general assets). Finding that Trinity had already provided the plaintiffs with all vacation benefits earned during their employment at Ortner in 1986 and early 1987, the district court found that the plaintiffs had "not sustained any damages," 712 F.Supp. at 1298, due to Avondale's refusal to pay. The court reasoned that to allow recovery against Avondale under these circumstances would be to award the plaintiffs a double recovery amounting to a "windfall" and, accordingly, granted the defendant summary judgment on the vacation pay claim.

Plaintiffs appeal, claiming that while the district court correctly identified the appropriate standard of review as *de novo*, it nevertheless subjected Avondale's interpretation of the unwritten severance plan to the more deferential "arbitrary and capricious" standard applied in this circuit before *Bruch*. *See Adcock v. Firestone Tire and Rubber Co.*, 822 F.2d 623, 626 (6th Cir. 1987). With regard to the vacation pay plan, plaintiffs claim that Ohio law precludes the district court's finding that Trinity had discharged Avondale's obligation to pay accrued benefits, and that the court misread the stipulated facts when it found that awarding vacation pay would result in a windfall to the plaintiffs. We address the plaintiffs' claims of error with regard to each plan separately below.

II.

A. The Avondale Severance Benefits Plan

Until it adopted the Limited Severance Plan shortly before Ortner was sold, Avondale never had a written severance benefits plan.[2] The parties argree, however, that such a plan did exist and they have stipulated to its terms in the following language:

> Eligible salaried employees were entitled to one week of current salary for each year of service with Ortner with a minimum of two weeks and a maximum of eight weeks. Eligible salaried employees were those who were involuntarily terminated from service with Defendant Avondale. Persons who resigned, retired or were fired for gross misconduct were not eligible for severance benefits.

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[2] With regard to both the unwritten plan and the Limited Severance Plan, Avondale failed to comply with ERISA's requirements that it file an annual report, 29 U.S.C. § 1021(b)(4); distribute a summary plan description to employees, 29 U.S.C. § 1021(a)(1); and reduce the plan to writing, 29 U.S.C. § 1102(a)(1). The plaintiffs have not, however, asserted these procedural violations as grounds for substantive relief.

The parties also agree that a period of unemployment following termination was never a prerequisite for obtaining severance pay under the unwritten plan. In fact, defendant acknowledges that prior to the sale of Ortner it had not denied severance benefits to any employee simply because he or she had immediately secured new employment upon termination.

On November 19, 1986, Avondale agreed to sell the assets of the Ortner division to Trinity Industries. Shortly thereafter, Avondale officials estimated the cost of providing severance and vacation benefits to all salaried Ortner employees taking positions with Trinity at $170,000. Avondale then composed the Limited Severance Plan, which purported to deny severance benefits to all salaried Ortner employees who accepted positions with Trinity, but to allow benefits to those who were either not offered such employment or who were offered but refused a position. Less than two weeks prior to the closing of the assets sale, the Limited Severance Plan was reduced to writng and distributed to some, but not all, of Ortner's salaried employees. The sale was closed on January 16, 1987, with the signing of a Purchase and Sale Agreement.

Trinity made a separate decision to rehire each one of the plaintiffs in this action. Of the 40 plaintiffs, none missed even one day of work as a result of the change of ownership, most retained identical job responsibility, and all but two were hired by Trinity at the salary they received while with Avondale. Trinity has no severance pay policy of its own and has declined to assume any severance obligations that may be owed to Ortner employees by Avondale. Nine former Ortner employees hired by Trinity at the time of the sale have since been involuntarily terminated and have received no severance pay.

B. The Validity of the Limited Severance Plan

The plaintiffs have brought this action pursuant to 29 U.S.C. § 1132(a) which provides, *inter alia,* that a "civil action may be

brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan. . . ." It would seem elementary, therefore, that before determining what benefits are due, we must ascertain the terms of the plan in effect at the time of the assets sale. In order to do so, we are required to resolve a dispute between the parties as to whether the Limited Severance Plan constitutes a valid amendment of the unwritten plan. For guidance on this question, we turn to ERISA and the substantial body of case law applying its terms to benefit plan amendments.

Plaintiffs maintain that, by requiring plan administrators to satisfy fiduciary duties of care and loyalty when administering a benefits plan, Congress intended to foreclose amendment or termination of all benefit plans except where such action would be in the interest of plan participants. ERISA sets forth the fiduciary responsibility attaching to employee benefit plans in Subchapter I, Subtitle B, Part 4 of the Act, 29 U.S.C. §§ 1101-1114. Avondale, as the administrator and fiduciary of its severance plan, 29 U.S.C. § 1002(a), was required to conform to the following standard of care:

> [1] a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. . . .

29 U.S.C. § 1104. Courts have read this section to impose "an unwavering duty on an ERISA trustee to make decisions with single-minded devotion to a plan's participants and beneficiaries and, in so doing, to act as a prudent person would act in a similar situation." *Morse v. Stanley,* 732 F.2d 1139, 1145 (2d Cir. 1984), *quoted in Berlin v. Michigan Bell Telephone Co.,* 858 F.2d 1154, 1162 (6th Cir. 1988). *See also Donovan v. Bierwirth,* 680 F.2d 263, 271 (2d Cir.), *cert. denied,* 459 U.S. 1069 (1982). Fiduciaries who breach these duties may be held "liable to make good to such plan any losses to the plan resulting from each such breach. . . ." 29 U.S.C. § 1109.

While employers clearly must satisfy fiduciary duties when administering benefit plans, *Musto v. American General Corp.,* 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied,* 109 S.Ct. 1745 (1989), it is equally plain that simply because an employer is also a benefits plan administrator "ERISA does not require that 'day-to-day corporate business transactions, which may have a collateral effect on prospective, contingent employee benefits, be performed solely in the interest of plan participants.' " *Hickman v. Tosco Corp.,* 840 F.2d 564, 566 (8th Cir. 1988) (quoting *Phillips v. Amoco Oil Co.,* 614 F.Supp. 694, 718 (N.D. Ala. 1985), *aff'd,* 799 F.2d 1464 (11th Cir. 1986), *cert. denied,* 481 U.S. 1016 (1987)). Whether Congress contemplated that an employer would be subject to the fiduciary duty requirement when amending an unfunded contingent benefit plan is best divined by examining the structure of the Act as a whole.

ERISA distinguishes between two species of benefit plans: "employee pension benefit plans" and "employee welfare benefit plans." *Compare* 29 U.S.C. § 1002(2)(A) *with* § 1002(1). It is now well established that severance benefit plans, such as the one before us here, are welfare benefit plans. *Morash,* 109 S.Ct. at 1671-72; *Holland v. Burlington Industries, Inc.,* 772 F.2d 1140, 1143 (4th Cir. 1985), *summarily aff'd,* 477 U.S. 901 (1986). Subchapter I of the Act, entitled "Protection of Employee Benefit Rights," imposes obligations on pension

benefit plan administrators in four separate areas: reporting and disclosure, §§ 1021-1031; participation and vesting, §§ 1051-1061; funding, §§1081-1086; and fiduciary responsibility, §§1101-1114. Welfare benefit plan administrators are required to comport with the fiduciary responsibility requirements and the reporting and disclosure requirements. They are explicitly exempted, however, from the obligations of the participation and vesting sections and the funding sections of the Act. 29 U.S.C. §§1051, 1081.

Although Congress considered imposing vesting requirements on welfare benefits, it decided to limit vesting to pension plans in order to "keep [] costs within reasonable limits." S. Rep. No. 383, 93d Cong., 2d Sess. 18, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4890, 4903 and in 1 Legislative History of the Employee Retirement Income Security Act of 1974 at 1086 (1976); Note: *Unfunded Vacation Benefits: Determing the Scope of ERISA*, 87 Colum. L. Rev. 1702, 1715. Apparently, Congress chose not to impose vesting requirements on welfare benefit plans for fear that placing such a burden on employers would inhibit the establishment of such plans. *See* Note, supra, 87 Colum. L. Rev. at 1715 n.93 and accompanying text. In drawing the line between employer actions subject to the fiduciary duty requirement and those not, we must avoid any rule that would have the effect of undermining Congress' considered decision that welfare benefit plans not be subject to a vesting requirement. We are compelled, therefore, to reject plaintiffs' proposed rule that welfare benefit plans such as the one before us be amended or terminated only when such action would be in the best interests of the employees. To adopt such a requirement would, in effect, accord employees a vested right to welfare benefits, thereby upsetting ERISA's delicate balance in this area. Instead, we employ the rule, already announced by this circuit as dicta in *Musto,* 861 F.2d at 911, that a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan. In so doing, we join the majority of circuits that have already ruled on this issue.

The extent to which fiduciary duties govern an administrator's decision to amend or terminate a benefits plan was first addressed by the Fourth Circuit in *Sutton v. Weirton Steel Div. of National Steel Corp.*, 724 F.2d 406 (4th Cir.), *cert. denied,* 467 U.S. 1205 (1984). In *Sutton,* the defendant corporation provided unfunded early retirement and severance pay benefits in the event of "termination" from employment with the company. As part of an agreement to sell the division for which plaintiffs worked, defendant provided that the sale would not trigger payment of these contingent benefits. In the face of a finding that the "sole motivation for the sale was avoiding future pension obligations," 724 F.2d at 410, the Fourth Circuit answered the "critical question," whether ERISA "imposes any fiduciary obligations to maintain the contingent benefits about which the appellants complain," *id.,* in the following language:

> The accrued benefits secured by ERISA do not encompass unfunded, contingent early retirement benefits or severance payments. The Act was not designed to prohibit modification of these ancillary benefits. Rather, Congress believed that the "vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." An employer may change such benefits without violating ERISA. Any right to payment of benefits before normal retirement age must be found in pertinent employment agreements.

Id. (citations omitted).

The Seventh Circuit adopted the reasoning of *Sutton* in *Young v. Standard Oil (Indiana),* 849 F.2d 1039 (7th Cir.), *cert. denied,* 109 S.Ct. 529 (1988). In *Young,* the defendant employers amended their severance plan shortly before the sale of a division in order to avoid paying an estimated $6.2 million in severance benefits. The original plan, providing that

employees would not receive severance pay in the event of a "sale of facilities when the new owner offers to the employee *comparable employment*," 849 F.2d at 1041 (emphasis in original), was amended to provide that severance benefits would not be paid when an employee was offered any position with the purchasing company, comparable or not. When the division was sold and the purchasing company offered plaintiffs employment that was not comparable, plaintiffs sued to enforce the terms of the original severance plan, claiming that the unilateral amendment to the plan was void as a violation of the defendants' fiduciary duty. The Seventh Circuit rejected this argument in the following passage:

> [S]everance benefits are unaccrued, unvested benefits. Moreover, severance benefit plans, though subject to certain disclosure (29 U.S.C. §§1021-1031) and fiduciary (29 U.S.C. §§ 1101-1114) requirements, are exempt from the more stringent ERISA requirements. 29 U.S.C. §§1051, 1081. An employer may therefore, unilaterally amend or eliminate a severance plan without violating ERISA. This is so because an employer is permitted to act in a dual capacity as both the manager of its business and a fiduciary with respect to unaccrued benefits. An employer is therefore, free to alter or eliminate severance benefits (which are usually solely funded by the employer) without consideration of the employees' interests. In short, an employer does not owe its employees a fiduciary duty when it amends or abolishes a severance benefit plan.

Young, 849 F.2d at 1045 (citations omitted).

The same conclusion has been reached by the Eleventh Circuit, which has held that "ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued." *Phillips v. Amoco Oil Co.,* 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied,* 481 U.S. 1016 (1987).

In this circuit's first foray into the area, we held that an employer could lawfully exercise an expressly reserved power to terminate an employee welfare benefit plan that was providing benefits for employees who had already retired. *In re White Farm Equipment Co.,* 788 F.2d 1186 (6th Cir. 1986). In declining the district court's invitation to adopt a broad prohibition against termination of welfare benefits for retired employees, we found that

> the conscious exclusion of welfare plans from the complex and finely-tuned compromise provisions on vesting, participation and funding applicable to pension plans and the provision for distribution of welfare plan assets on termination counsel strongly against imposition of mandatory vesting standards through case law. . . .

788 F.2d at 1192. Nevertheless, we declined, on the facts of that case, to grant plan administrators carte blanche to amend or terminate even unfunded, unvested, welfare benefits, writing:

> [W]e are not in disagreement with the district court's conclusion "that no leap of logic transforms Congress' exclusion of welfare benefit plans from various ERISA requirements into an express endorsement of unfettered unilateral termination of such plans."

788 F.2d at 1192 (citation omitted). *White Farm,* therefore, established the rather modest rule that "the parties may themselves set out by agreement or by private design, as set out in plan documents, whether retiree welfare benefits vest, or whether they may be terminated." 788 F.2d at 1193.

We addressed the same issue again two years later in *Musto.* In *Musto,* the defendant corporation established an employee welfare benefits plan that included within its provisions an express reservation of plenary power to amend or terminate the plan at any time. When the defendant amended the plan to require, *inter alia,* partial payment of health insurance premiums

from retired employees, those employees sued claiming a breach of fiduciary duty. We held to the contrary, explaining that the defendant "had no fiduciary duty to establish any medical insurance plan, much less one that could never be amended without the approval of those to whom it applied," and therefore that "[i]t is hard to see how the company's express reservation of a right to amend the plan can be said to constitute 'overreaching' when a prudent employer . . . could well have decided . . . not to provide such coverage at all. . . ." 861 F.2d at 912.

We then reinforced our decision in *Musto* by joining those circuits that have held an employer has no fiduciary duty with regard to the amendment or termination of a welfare benefits plan:

> The case law, in any event, makes it clear that when an employer decides to establish, amend, or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms, its actions are not to be judged by fiduciary standards.

Musto, 861 F.2d at 912.

The plaintiffs are correct in distinguishing *White Farm* and *Musto* on the grounds that both of these cases involved an employer's exercise of an explicitly reserved power to amend its benefits plan, while Avondale's severance plan includes no such reservation. This failure is particularly troubling when one considers ERISA's admonition, contained in Part Four entitled "Fiduciary Responsibility," that: "Every employee benefit plan shall . . . (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(b). The provision serves the important purpose of insuring "against the possibility that the employee's expectation of the benefit would be defeated," *Morash,* 109 S.Ct. at 1673, by an unanticipated amendment of a welfare plan, whose benefits employees may come to take for granted. We do not believe, however, that Congress intended

that any plan failing to comply with section 1102(b) would, for that reason alone, become unamendable. Plaintiffs have failed to show any detrimental reliance based on the defendant's failure to comply with section 1102(b), and, under these circumstances, we decline to impose the substantive remedy of prohibiting plan amendment in response to defendant's procedural violations. *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984), *cert. denied*, 477 U.S. 865 (1985) (absent a defendant's bad-faith failure to comply with ERISA's reporting requirements, employees ordinarily have no substantive remedy under the Act).

Finally, we note that nothing in the Supreme Court's recent decision in *Bruch* implies the invalidity of the case law excluding amendments of welfare benefit plans from scrutiny under ERISA's fiduciary duty requirements. *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546, 552 (6th Cir. 1989) (Nelson, J., concurring). The Supreme Court's holding in *Bruch* was explicitly "limited to the appropriate standard of review in § 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations." 109 S.Ct. at 948.

Having found that the Limited Severance Plan effected a valid amendment of the unwritten severance pay plan, we read its unambiguous terms to preclude the plaintiffs' claims for severance pay. We therefore express no opinion as to the accuracy of the district court's interpretation of the unwritten plan.[3] It is important to note, however, that several of the "fac-

[3] The interpretation of a severance plan is necessarily a highly fact-specific inquiry in which precedent will often provide little guidance. Nevertheless, we note that at least one circuit has reversed as "arbitrary and capricious" an administrator's decision that a sale of assets did not effect a "termination" of employees from their jobs with the selling company. *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495, 1498 (11th Cir. 1987); *see also Bennett v. Gill & Duffus Chemicals, Inc.*, 699 F.Supp. 454, 458-62 (S.D.N.Y. 1988) (same). In the only circuit court decision to address the issue since the *Bruch de novo* standard, the Third Circuit has held that the sale of a going concern effected a "termination" of employment requiring payment of severance benefits. *Ulmer v. Harsco Corp.*, 884 F.2d 98, 104 (3rd Cir. 1989).

tors" employed by the district court to interpret the plan, while well-suited to determining whether an administrator's interpretation is "arbitrary and capricious," have less utility in divining the intent of the parties as required by *Bruch*. For example, the district court noted that this circuit has looked to "consistency" when reviewing benefit plans in the past, asking whether "the employer [has] followed the same approach in similar situations." *Avondale,* 712 F.Supp. at 1295 (citations omitted). While we have indeed considered this factor in several of our opinions, we did so with an eye toward determining whether an administrator's decision was so anomalous as to appear "arbitrary and capricious" in light of past statements and actions. *See, e.g., Adcock,* 822 F.2d at 626. We doubt whether consistency of interpretation will continue to play such a prominent role in the *de novo* interpretation of the terms of ERISA plans under section 1132(a)(1)(B). The district court also notes that "the Court should closely scrutinize an employer's interpretation of a benefit plan when the employer has avoided a large outlay as a result of its decision." *Avondale,* 712 F.Supp. at 1295 (citations omitted). Again, this rule was useful for singling out situations in which an employer might be likely to act in an arbitrary and capricious manner, but it is simply inapposite to the process of *de novo* intrepretation. *De novo* interpretation looks to the terms of the plan, not to either party's interpretation of those terms. *Bruch,* 109 S.Ct. at 955. Courts should proceed carefully before applying rules developed specifically to ferret out arbitrary and capricious action when interpreting the terms of a plan *de novo*. *See Ulmer v. Harsco Corp.,* 884 F.2d 98, 104 (3rd Cir. 1989); *Bruch v. Firestone,* 828 F.2d 131, 147-48 (3rd Cir.), *rev'd on other grounds, Bruch,* 109 S.Ct. 948.

III. The Vacation Benefits Plan

Before proceeding to an analysis of plaintiffs' vacation pay claims, it is useful to review the differences between the Avondale vacation plan and the Trinity plan offered to the employees

who remained with Ortner after the sale. According to the Avondale plan, at the beginning of each calendar year an employee acquired a vested right to all vacation pay earned while working for Avondale the previous year. The employee could then take his allotted time off with full pay at any time during the next 12 months.

Trinity, while offering roughly the same amount of paid vacation per year of service, calculates the vesting of vacation pay somewhat differently. The Trinity plan provides that salaried employees earn and expend their vacation benefits in the same year. No vacation benefits vest for the year until June 1. After June 1, an employee may take all of his earned vacation time for that calendar year.[4] Trinity generally gives no vacation pay to employees in their first year.

Both Avondale and Trinity calculate the amount of vacation pay an employee is entitled to in a given year by the number of years the employee has worked with the company, from a minimum of two weeks for employees having worked one year, to a maximum of four weeks for those who have worked 20

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[4] If terminated from employment with Trinity after June 1, the employee is paid for any unused, earned vacation; however, employees terminated prior to June 1 receive no vacation pay for the calendar year of departure. An employee who takes vacation prior to June 1 and then leaves Trinity prior to June 1 must return his vacation pay through a deduction from his last payroll check.

years or longer.[5] In calculating "length of service" after the assets sale, Trinity credited Ortner employees for their years of service with the division and allowed plaintiffs to take a vacation during their first year at Trinity. Giving such credit was Trinity's standard practice upon the purchase of a new division. Trinity was not obligated in any way to offer this credit, and Avondale gave Trinity no consideration in exchange for this practice.

All but two of the plaintiffs received vacation pay from Trinity in 1987 that either equaled or exceeded the dollar amount of vacation they had accrued at Avondale in 1986. At least one plaintiff, who left Trinity before June 1, 1987, however, received no vacation benefits at all from Trinity.

Because vacation plans in which a single employer pays benefits from its general assets do not constitute "employee

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[5] Avondale's policy provides as follows:

> An employee earns vacation over the course of the calendar year in accordance with the following schedule:
>
> After 1 year of service: 2 weeks
>
> . . .
>
> after 10 years of service: 3 weeks
>
> after 20 years of service: 4 weeks

Trinity established the following vacation policy for salaried employees at the Mount Orab facility:

> *Vacation Plan:* vacation is earned on June 1 based on your length of service at Ortner. Current employees or those rehired during 1987 will receive vacation based on the following schedule:

More than or Equal to	*But Less Than*	*Hours of Paid Vacation*
1 year	5 years	2 weeks
. . .		
10 years	20 years	3 weeks
20 years +		4 weeks

benefit plans" within the meaning of ERISA, we look to the law of Ohio in determining plaintiffs' rights under Avondale's vacation plan. *Morash,* 109 S.Ct. at 1675.

The record is clear that, at least as of the date Ortner was sold, Avondale owed vacation benefits to the plaintiffs for the work they performed while at Avondale in 1986. The Avondale vacation plan provided for the vesting of vacation pay as follows:

> An employee earns vacation over the course of the calendar year. . . . As of January 1 immediately following such calendar year, the employee becomes entitled to and vested in the vacation which had been earned in the previous year.

Furthermore, the plan provided for payment of accrued vacation pay upon termination of employment in the following unequivocal language:

> An employee whose employment is terminated for any reason shall receive vacation pay not yet received if eligible for such vacation pay under the provisions of this Article.

Avondale, 712 F.Supp. at 1293.[6] Finally, the Limited Severance Plan expressly leaves this obligation unimpaired:

> You will receive your vacation pay for 1987 which you earned by working in 1986 in accordance with the Company vacation plan in effect on January 1, 1986.

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[6] The district court purports to quote the above language from the vacation pay plan itself. We note an inconsistency between this quotation and the parties' stipulation which provides that:

> Avondale's written vacation pay policy was silent regarding payment of unused vacation upon a salaried employee's termination. However, Avondale has paid terminated employees unused earned vacation pay.

We regard this disparity as inconsequential, however, in light of the clear purport of the Limited Severance Plan excerpted, *infra.*

Avondale argues, however, that any obligation it owed to Ortner employees at the time of the sale has since been discharged by Trinity. Avondale contends that, under Trinity's vacation policy as it existed at the time of the Ortner sale, new employees did not earn vacation benefits in their first year of employment. Avondale then asserts that Trinity agreed, in response to an inquiry from Avondale, to make an exception to this policy with regard to the Ortner sale by providing the division's employees with vacation during their first year in an amount equivalent to the vacation they would have received had they continued to work for Avondale. Defendants conclude, on this basis, that Avondale's obligation has been discharged by Trinity's substitute performance.

Avondale's argument is flawed in several respects. First, it is clear from the record that Trinity never agreed with Avondale to assume Avondale's vacation pay obligations to the plaintiffs. Defendant's protestations to the contrary are unavailing against the parties' stipulation that (i) Avondale imposed no contractual obligation on Trinity to offer vacation credit to Ortner employees for years of service, (ii) Avondale neither gave nor offered Trinity any consideration in exchange for the vacation pay credit, and (iii) Trinity's practice in previous acquisitions had always been to give employees of the acquired entity credit for service with the acquired entity. Furthermore, the Purchase and Sale Agreement provides in no uncertain terms that Trinity did not assume Avondale's obligation to pay the Ortner employees any benefits still owing at the time of the sale:

> It is understood and agreed that Purchaser is only purchasing certain assets of Seller, that Purchaser is not intended to be a successor to Seller for any purpose unless expressly set forth herein, and that Purchaser has not assumed, and expressly denies assumption hereby of, any other liability, obligation or commitment of Seller other than as set forth above or otherwise expressly set forth herein.

The only direct evidence Avondale presents in support of its argument that Trinity provided benefits to Ortner employees with the intent of satisfying Avondale's obligations is the following excerpt from the deposition of a Trinity vice president:

> Q. [I]s it a fair statement that those employees who went to work for Trinity after the closing received during 1987 vacation that they would have received had there been no closing?
>
> A. Yes, so as far as I know, that was the intention.
>
> . . . .
>
> Q. But your intention was. . . .
>
> . . . .
>
> Q. To make sure they didn't lose any vacations in 1987 as a result of the sale. Is that a fair statement?
>
> A. Yes.

This answer reveals no information relevant to the disposition of the issue before us, however. The fact that Trinity intended to ensure that Ortner employees would not suffer diminished benefits upon the change of ownership would seem to evince no more than Trinity's straightforward desire that the Ortner facility retain its employees by continuing to compensate them adequately.

Finally, Avondale contends that were the plaintiffs to recover the vacation benefits sought in this case, they would receive twice as much vacation pay in 1987 as they would have been entitled to had they remained with Avondale. The defendant asserts that Trinity had no reason to provide the plaintiffs with such a "windfall," and therefore that Trinity must have intended to discharge the defendant's obligations when it paid for plaintiffs' vacations in 1987. We reject defendant's analysis.

Avondale's argument proceeds from the premise that Trinity intended to place employees of its newly-acquired division in the same position they would have been in had the sale of assets never occurred. Defendant contends that Trinity must therefore have intended that Ortner employees would be given the same amount of vacation in 1987 as they would have been given had the division not been sold, and that the employees would be paid the same wages during that vacation as they would have been paid in the absence of the sale. If Trinity's payment does *not* effect a discharge, Avondale contends, the objective of leaving employees' benefits unchanged by the sale of assets is frustrated. The following example is used to illustrate this point. Suppose that after June 1, 1987, but before January 1, 1988, an Ortner employee takes a vacation. Trinity pays his wages during that vacation, placing him in a position *identical* to the position he would have been in had the sale of assets never taken place. If, however, the employee is allowed to recover vacation pay from Avondale, he is in a *better* position than he would have been in had there been no sale. He has taken the same amount of vacation in 1987 as he would have taken had he remained at Avondale, but he has been paid *more*: he has been paid his salary during the two weeks by Trinity *and* he has been paid the equivalent of his salary for two weeks by Avondale. Surely, Avondale argues, Trinity did not intend to place Ortner employees in a *better* position because of the sale. Trinity wanted its new employees to take a paid vacation in 1987, but it did not want them to be paid *double* during those two weeks. According to this argument, when Trinity paid for the vacations taken by Ortner employees during 1987, it must have intended to discharge Avondale's legal obligation.

In addressing this contention, it must be understood that Avondale's argument is simply an attempt to prove, through circumstantial evidence, that Trinity *intended* to discharge Avondale's obligation. Given the premise that Trinity's objective was to place Ortner employees in as good a position as they

would have been in had the sale of assets never occurred, Trinity must have looked to the employees' expectations of benefits at the time of the sale, with the understanding that the employees might leave Ortner at any time—not only in 1987, but in 1988 and beyond. When we look at an Ortner employee's expectation of benefits, we see that the Trinity plan alone does not place him in as favorable a position as he would have been in had he remained at Avondale. The reason is that an employee who leaves Trinity between January 1 and June 1 of any given year will receive no benefits during that year from Trinity, while he would have received benefits had he remained at Avondale. To illustrate, suppose the sale of assets had never occurred, and that an employee were to leave Ortner between January 1 and June 1 of 1988. The employee would depart with the following benefits in his "bank": one year of benefits paid in 1987 for work performed in 1986 and one year of benefits paid in 1988 for work performed in 1987. Because the sale of assets did occur, the Ortner employee, now working at Trinity, will in fact leave with less in his "bank": he will have accumulated one year of benefits, paid in 1987 for work performed through June 1, 1987, and that is all. He is in a *worse* position because of the sale. According to Avondale's own argument, Trinity did not intend for Ortner employees to be in a *worse* position because of the sale of assets. Trinity could not, therefore, have intended that payments it made in 1987 would discharge Avondale's obligation to pay benefits accrued in 1986.

Defendant also relies on a case decided by the Ohio Court of Appeals, *Armstrong v. Diamond Shamrock Corp.*, 7 Ohio App. 3d 296, 455 N.E.2d 702 (1982), which it contends is dispositive of this appeal. In *Armstrong*, the defendant sold one of its divisions pursuant to an agreement in which the purchaser specifically agreed to pay for all vacations taken after a given date. Plaintiffs, employees of the acquired division, took vacations after the specified date, received pay from the purchasing corporation, and then demanded additional payment

from the defendant based on the terms of its vacation plan. The court of appeals refused to allow duplicative recovery in this instance, holding that the defendant "unquestionably made a third-party beneficiary contract with [the purchaser], under which [the purchaser] agreed to satisfy defendant's vacation benefit obligations to these creditor-beneficiary employees." 7 Ohio App. 3d at 299, 455 N.E.2d at 705 (citations omitted). As discussed above, no such third-party beneficiary contract between Avondale and Trinity, whether written or oral, express or implied, appears in the record before us. Nor is there any evidence that Trinity understood that it was discharging Avondale's obligation when it offered vacation credit to the plaintiffs. Under these circumstances, Avondale's duty was clearly not discharged, *see* RESTATEMENT (SECOND) OF CONTRACTS § 318, and summary judgment ought to have been entered in favor of plaintiffs on their claim for vacation pay.

The judgment of the district court is **AFFIRMED** in part and **REVERSED** in part and the case is **REMANDED** for disposition in accordance with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

C-1-88-0214

NORMAN ADAMS, et al,
Plaintiffs,

v.

AVONDALE INDUSTRIES, INC., et al,
Defendants.

ORDER

This matter is before the Court on cross-motions for summary judgment. In accordance with Federal Rule of Civil Procedure 52, the Court does hereby set forth its Findings of Fact, Opinion, and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiffs are former salaried employees of the Ortner Freight Car Division (Ortner) of defendant Avondale Industries, Inc. (Avondale) located in Mt. Orab, Ohio. All plaintiffs are residents of either Kentucky or Ohio. Defendants Avondale and Connell Limited Partnership (Connell) are citizens of states other than Ohio and Kentucky.

2. Pursuant to a sale agreement executed on November 19, 1986 and effective January 16, 1987, Avondale sold the assets of Ortner to Trinity Industries, Inc. (Trinity), an unrelated entity. Trinity did not assume any liabilities of Avondale in the sale. Since the sale, Trinity has operated the Mt. Orab facility.

3. Subsequent to the sale, Avondale sold many of its assets to defendant Connell.

4. Effective January 16, 1987, plaintiffs' employment with Avondale ceased. Plaintiffs were hired by Trinity and began work for that corporation on January 19, 1987.

5. Trinity decided separately as to each plaintiff whether to extend an offer of employment. Trinity was under no contractual obligation to hire any Avondale employees. Some of the plaintiffs hired by Trinity were given different job responsibilities, titles, and levels of compensation than they had at Avondale.

6. Since at least September, 1985, Avondale had an unwritten severance pay policy for salaried employees of Ortner. This policy was in effect at the time Avondale sold its assets to Trinity. Severance benefits were paid out of Avondale's general assets.

7. Under the terms of the severance plan, eligible employees were entitled to one week of current salary for each year of service with Ortner. The employees were entitled to a minimum of two weeks salary and a maximum of eight weeks salary. Eligible employees were those involuntarily terminated from Avondale's employ. Employees who resigned, retired, or were terminated for gross misconduct were not eligible for severance benefits.

8. Payment of benefits under the unwritten severance pay policy was not conditioned on whether the terminated employee found employment with another company or remained unemployed.

9. Prior to the sale of Avondale's assets to Trinity, the Ortner severance pay policy did not address the issue of eligibility for severance benefits in the event of a sale of assets.

10. Some time subsequent to the execution of the sale agreement and prior to the closing date, Avondale adopted a "Limited Severance Plan." The plan provided that all salaried employees of Ortner who accepted positions with

Trinity were ineligible for severance benefits. Ortner employees who were offered, but did not accept, employment with Trinity received severance pay from Avondale. A period of unemployment after termination was not a precondition to the receipt of severance benefits.

11. Less than two weeks prior to the closing date, the Limited Severance Plan was reduced to writing and distributed to some, but not all, Ortner employees.

12. Trinity does not have a severance pay policy for its employees. Nine former Ortner employees initially hired by Trinity who have since been terminated from service with Trinity have received no severance pay.

13. Avondale's vacation pay policy for salaried Ortner employees provided that, "An employee earns vacation over the course of the calendar year . . . As of January 1 immediately following such calendar year, the employee becomes entitled to and vested in the vacation which had been earned in the previous year."

14. The vacation pay policy further provided that "An employee whose employment is terminated for any reason shall receive vacation pay not yet received if eligible for such vacation pay under the provisions of this Article."

15. The Limited Severance Plan stated that employees would receive vacation pay which they earned by working in 1986 in accordance with the company vacation plan in effect on January 1, 1986. Avondale originally intended to abide by this provision of the Limited Severance Plan. However, it determined not to pay plaintiffs for unused, accrued vacation time when it learned that Trinity intended to credit plaintiffs for their years of service at Ortner in calculating vacation benefits.

16. The vacation pay plaintiffs received from Trinity in 1987, with two exceptions, equalled or exceeded the dollar amount of vacation accrued by plaintiffs at Ortner in 1986.

17. Under Trinity's vacation policy, vacation benefits for the calendar year vest on June 1 of that year. An employee is entitled to take his vacation in the year in which it is earned. If an employee leaves Trinity in the first five months of a calendar year, he is not entitled to vacation benefits for that year. If an employee is terminated after June 1, he is paid for unused vacation accured in that calendar year.

CLAIMS OF THE PARTIES

Plaintiffs allege that they are entitled to severance benefits under the unwritten severance pay policy in effect before the Ortner sale. Plaintiffs contend that Avondale was not entitled to alter its severance pay policy on the eve of the Ortner sale so as to avoid their obligations under the unwritten policy. Plaintiffs further claim that they are entitled to receive vacation pay for the years 1986 and early 1987.

Defendants claim that the Limited Severance Plan is the only plan of any relevance to this case. They claim that the plan is a valid modification of Avondale's unwritten severance pay policy. In the alternative, defendants contend that Avondale's refusal to pay benefits under the Limited Severance Plan must be upheld as a valid interpretation of the unwritten severance pay plan. Finally, defendants allege that plaintiffs' claims for vacation pay must fail because plaintiffs have received all vacation benefits to which they are entitled.

OPINION

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admissions, and affidavits do not raise a genuine issue of material fact for trial. Federal Rule of Civil Procedure 56(c), *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of material fact." *Ander-*

son v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original.)

I. SEVERANCE PAY

Title 29 U.S.C. §1132(a)(1)(B) empowers a participant or beneficiary to bring a civil action

> to recover benefits due him under terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

As a general rule, a de novo standard of review applies to a denial of employee benefits challenged under §1132(a)(1)(B). *Firestone Rubber Co., et al v. Bruch, et al,* 109 S.Ct. 948 (1989). However, a deferential standard of review is appropriate when the ERISA plan expressly gives the plan administrator or fiduciary the discretionary authority to determine eligibility for benefits or to construe the plan's terms. *Id.*

There is no evidence that the unwritten severance plan to which the parties have stipulated or the Limited Severance Plan vested the plan administrator or fiduciary with discretionary authority.[1] Thus, a de novo standard of review applies in determining whether defendants violated §1132(a)(1)(B) by denying plaintiffs severance benefits. The Court must ascertain the terms of the plan in light of all the circumstances and evidence disclosing the parties' intent. *Id.* The Court must then determine whether the decision to deny benefits is consistent with the terms and purpose of the plan.

Under the express terms of the Limited Severance Plan, plaintiffs were excluded from receiving severance pay upon the Ortner Sale since they accepted offers of employment with Trinity.

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[1] The Court has previously determined that Avondale's severance pay policy is an "employee welfare benefit plan" as defined under ERISA (Doc. No. 13).

However, this does not end the Court's inquiry. In determining whether plaintiffs are entitled to severance pay, the Court must consider (1) whether the Limited Severance Plan was an amendement of the unwritten severance policy, which policy Avondale was entitled to unilaterally modify, and (2) if not, whether the denial of severance pay to plaintiffs is based on a valid interpretation of the unwritten severance policy.

An employer does not act as fiduciary when he decides to establish, amend or terminate a benefit plan. *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied,* 57 USLW 3687 (1989); *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988). Nonetheless, the United States Court of Appeals for the Sixth Circuit has acknowledged that Congress has not expressly endorsed "unfettered unilateral termination of welfare benefit plans." *In Re White Farm Equipment,* 788 F.2d 1186, 1192 (6th Cir. 1986). Thus, the ruling in *Musto* does not necessarily compel the conclusion urged by defendants, which is that an employer is free to amend or terminate a benefit plan under any circumstances irrespective of its employees' welfare.

However, the Court need not ascertain under what circumstances amendment or termination of a benefit plan is proper. Assuming, *arguendo,* that defendants acted improperly in amending or terminating the unwritten severance policy on the eve of the Ortner sale, the Limited Severance Plan withstands judicial scrutiny as a valid interpretation of the unwritten severance plan.

Numerous cases have addressed the issue of denial of severance pay in the event of a sale of a company or one or more of its divisions. In determining whether denial of severance pay is valid in such a context, the Court must examine the particular facts of the case before it. A key factor to consider is consistency; i.e., has the employer followed the same approach in similar situations. *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d

623 (6th Cir. 1987); See *Blakeman v. Mead Containers,* 779 F.2d 1146, 1151 (6th Cir. 1985).

A second interrelated factor is the employer's purpose in granting severance pay. *Adcock,* 822 F.2d at 626. Severance pay is generally intended to provide an employee with income between jobs and should be considered more an unemployment benefit. *Id.* at 626-27. However, there may be instances where an employer has not intended that unemployment be a prerequisite to the receipt of severance pay. *Id.* Instead, an employer may grant severance pay as a reward for past service. See *Bennett v. Gill and Duffus Chemicals, Inc.,* 699 F.Supp. 454, 459-60 (S.D. N.Y. 1988). The employer's intent in a given case may be disclosed in the terms of the plan or may be evident from the employer's past practice. *Adcock,* 822 F.2d at 626-27.

The remaining factors that the Court should examine are (1) whether the severance plan vested the administrator with flexibility or discretion to apply it in particular cases; *Blakeman,* 779 F.2d at 1151; (2) the nature of the sale, e.g., whether the company or division was sold as an ongoing concern[2]; and (3) the extent to which the employer has complied with ERISA's procedural requirements. *Blau v. Del Monte Corp.,* 748 F.2d 1348, 1353 (9th Cir. 1983), *cert. denied,* 474 U.S. 865 (1985). Also, the Court should closely scrutinize an employer's interpretation of a benefit plan when the employer has avoided a large outlay as a result of its decision. *Garavuso v. Shoe Corps. of America Industries, Inc.,* 1989 U.S. Dist. Lexis 2764 (S.D. Ohio March 22, 1989) (Graham, J.) (unreported decision) (*citing Jung v. FMC Corp.,* 755 F.2d 708, 710 (9th Cir. 1985)).

In this case, Avondale drafted the Limited Severance Plan after calculating the cost of providing severance benefits to its

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[2] A company is sold as an "ongoing concern" when there is an agreement that all employees of the seller will be employed by the purchaser. *Adcock,* 822 F.2d at 624 n.2.

employees. By denying severance pay to plaintiffs, Avondale avoided an outlay of approximately $170,000 to $180,000. Although this does not necessarily indicate that Avondale acted improperly, the circumstances compel the Court to closely scrutinize Avondale's decision.

Upon review of the undisputed facts, the Court finds that the denial of severance pay to employees who accepted employment with Trinity was not inconsistent with Avondale's past practice and history. Avondale did not have an occasion prior to the Ortner sale to apply the unwritten severance plan in a situation involving a sale of assets. Avondale had not previously sold a division to an unrelated entity during the time the unwritten severance plan was in effect. Thus the Ortner sale presented Avondale with its first opportunity to construe the severance plan in such a context. The Court must therefore look to the remaining factors to ascertain whether Avondale's decision to deny severance pay to plaintiffs was valid.

With respect to the purpose of severance pay under the Ortner policy, the plan itself contains no express language stating what function Avondale intended severance pay to serve. Plaintiffs point to surrounding circumstances that allegedly evidence an intent on the part of Avondale that severance pay serve primarily as a reward for past service. First, plaintiffs assert that Avondale never conditioned the receipt of severance benefits on continued unemployment following termination. However, this does not suggest that Avondale intended that severance pay function as a reward for past service. The fact that unemployment was not a prerequisite to the receipt of severance benefits can be equally attributed to Avondale's desire to avoid monitoring a former employee's employment status following termination. See *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1149 (4th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986).

Second, plaintiffs contend that Avondale's actions during an "unusual business downturn" in 1986 demonstrate that sev-

erance pay functioned as a reward for past service. During that period, in anticipation of lay-offs, Avondale decided to delay paying severance benefits to employees until after they had been laid off for one year. Plaintiffs allege that if severance pay was intended as a economic measure, employees should have been paid severance benefits during the year in which they were unemployed, at which time they had the greatest need for such benefits. The Court disagrees with plaintiffs' analysis. Avondale's decision to delay severance pay to laid-off employees for one year is supported by a valid business rationale; that is, the company deemed it prudent to withhold severance pay until it was certain that laid-off employees would not be recalled. Avondale's special treatment of this situation does not bolster plaintiffs' argument.

Finally, plaintiffs point to the fact that the severance plan tied the amount of severance pay to an employees' years of service with the company. Defendants concede that tying the amount of benefits to length of employment is a way of rewarding long-term employees for their years of service with the company. Nonetheless, the plain terms of the plan demonstrate that Avondale did not intend severance pay to function primarily as a reward for past service. Under the plan, only those employees who were "involuntarily terminated" were entitled to severance pay. If severance pay were intended as a reward, it is inconceivable that Avondale would deny such benefits to those employees who resigned, retired or otherwise voluntarily chose to leave Avondale after serving the company faithfully for any number of years and choose to "reward" only those employees forced to leave the company.

In the absence of colorable evidence that Avondale intended severance pay to serve primarily as a reward for past service, and in view of the fact that severance pay was limited to involuntarily terminated employees, the general rule set forth in *Adcock* applies to this case. Accordingly, severance pay under the Ortner policy must be considered an economic measure in-

tended to bridge the gap for a terminated employee between jobs.

As indicated above, the severance plan did not vest the plan administrator with the flexibility or discretion to apply the plan in individual cases. Any "involuntarily terminated" employee was entitled to benefits. In the context of the Ortner Sale, Avondale interpreted the plan to mean that those employees who accepted employment with Trinity were not involuntarily terminated. This interpretation is consistent with the purpose, history and terms of the plan, primarily because plaintiffs did not suffer the hardships normally associated with an involuntary termination from employment as a result of the Ortner sale. It is true that Trinity's fringe benefits are not as valuable as those of Avondale as demonstrated by the comparison of benefits plaintiffs have offered. However, plaintiffs did not lose a day of work as a result of the sale; all but two of the forty plaintiffs were apparently hired by Trinity at the same salaries they received at Avondale (see plaintiffs' proposed findings of fact); and the majority of plaintiffs retained their same jobs. Moreover, although Ortner was not sold to Trinity as an ongoing concern, Trinity continued to operate the Mt. Orab facility, so that plaintiffs remained working at the same location. Trinity also offered plaintiffs continuity in their employment in that it credited them with years of service at Ortner for purposes of vacation, sick pay, medical coverage and life insurance.

Further, defendants knew that plaintiffs would not suffer the hardships normally associated with an involuntary termination. Defendants' knowledge distinguishes the Ortner sale from the typical involuntary termination where the employer does not know whether an employee will be immediately hired by an unrelated entity. Under these circumstances, Avondale's decision not to pay termination benefits to plaintiffs is a valid interpretation of the unwritten severance plan. See *Holland,* 772 F.2d at 1140; *Aquin v. Bendix Corp.,* 637 F.Supp. 657 (E.D.

Mich. 1986); *Douglas v. The Bendix Corp.*, 1988 U.S. App. Lexis 890 (6th Cir. Jan. 26, 1988) (unpublished opinion).[3]

An issue remains as to what effect defendants' procedural violations of ERISA have upon the outcome of this case. It is undisputed that Avondale failed to comply with ERISA's requirements that the administrator file an annual report (29 U.S.C. §1021(b)(4)); distribute a summary plan description to employees (29 U.S.C. §1021(a)(1)); and reduce the plan to writing. (29 U.S.C. §1102(a)(1)).

Ordinarily, only the United States Secretary of Labor has standing to complain about violations of ERISA's procedural requirements. *Aquin*, 637 F.Supp. at 665; *Garavuso*, 1989 U.S. Dist. Lexis 2764 at 19. An exception applies when the procedural violations are wholesale and flagrant (*Garavuso*, 1989 U.S. Dist. Lexis 2764 at 19)(citing *Coleman v. General Electric Co.*, 643 F.Supp. 1229, 1241 (E.D. Tenn. 1986)) such that the decision to deny benefits is made in the course of and infected by such violations. *Aquin*, 637 F.Supp. at 664. In order to have standing to complain about violations of ERISA's procedural requirements, plaintiffs must demonstrate reliance or prejudice resulting from such violations. *Id.* at 665; *Garavuso*, 1989 U.S. Dist. Lexis 2764 at 19.

The record does not establish that defendants' decision to deny severance pay to plaintiffs was made in the course of and infected by the procedural violations. Moreover, plaintiffs have not shown that they relied to their detriment on defendants' omissions or that they were prejudiced thereby. Plaintiffs do not claim that they were unaware of Avondale's unwritten severance policy. Similarly, although the Limited Severance Plan was not distributed to plaintiffs, they do not claim that

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[3] Although these cases were decided under the arbitrary and capricious standard of review, the reasoning of the Courts is nonetheless applicable to this case.

they were unaware of its existence or of the fact that they would not receive severance pay if they accepted offers of employment with Trinity. Accordingly, plaintiffs have no standing to complain of defendants' procedural violations.

II. VACATION PAY

In its order of October 14, 1988, the Court reserved ruling on whether plaintiffs' claims for vacation pay fall under ERISA or state law. Subsequent to the Court's order, the United States Supreme Court decided *Massachusetts v. Morash,* 57 U.S.L.W. 4429 (April 18, 1989). *Morash* holds that a single employer's policy of paying employees cash from its general assets in lieu of unused vacation time does not constitute a "welfare benefit plan" under ERISA. The parties agree that Avondale paid employees cash out of its general assets for unused vacation time. Therefore, plaintiffs' claims for vacation benefits must be resolved under state law.

It is undisputed that plaintiffs provided services to Avondale in 1986 for which they earned vacation to be taken in 1987; that the sale agreement did not require Trinity to assume Avondale's vacation pay obligations or to formulate a comparable vacation plan; and that the Trinity vacation plan differs from Avondale's plan in the following respects. A Trinity employee is entitled to take vacation in the year during which he earns vacation time, but vacation benefits do not vest until June 1 of a calendar year. In contrast, Avondale employees were entitled to take vacation earned in a given year in the subsequent year and such benefits did not vest until January 1 of the subsequent year.

Plaintiffs concede that Trinity gave them credit for vacation time earned at Avondale in 1986 and early 1987. Nonetheless, they claim that Trinity's action does not relieve Avondale of its obligation to pay them cash for unused vacation time accrued at Ortner during this period. Plaintiffs further allege that if they leave Trinity prior to June 1 of any calendar year, they will lose

a year of vacation benefits to which they would have been entitled had their employment with Avondale not terminated.[4]

The Court finds that plaintiffs are not entitled to the vacation pay they request from Avondale. To grant such relief would result in a windfall to plaintiffs. Plaintiffs do not dispute that they have received paid vacation from Trinity for service rendered to Ortner in 1986 and early 1987. The only injury they allege, which is potential loss of vacation pay if they leave Trinity before June 1 of any calendar year, is speculative. Because plaintiffs have failed to establish any damages resulting from Avondale's failure to pay them for unused accrued vacation time, defendants are entitled to summary judgment on plaintiffs' claims for vacation pay.

CONCLUSIONS OF LAW

(1) A de novo standard of review applies to plaintiffs' claims for severance pay brought under 29 U.S.C. §1132(a)(1)(B). *Firestone Rubber Co., et al v. Bruch, et al,* 109 S.Ct. 948 (1989).

(2) Defendants' decision to deny severance pay to plaintiffs is a valid interpretation of the unwritten severance pay policy and is consistent with the purpose and terms of the plan.

(3) Plaintiffs lack standing to claim violations of ERISA's procedural requirements by defendants since plaintiffs did not suffer any substantive harm as a result of such violations.

(4) Plaintiffs are not entitled to recover severance pay from defendants.

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[4] Plaintiffs allege that one unnamed plaintiff has lost a year of vacation benefits by leaving Trinity before June 1 of a calendar year.

(5) Plaintiffs' claims for vacation pay do not fall under ERISA, but are governed by state law. *Massachusetts v. Morash,* 57 U.S.L.W. 4429 (April 18, 1989).

(6) The Court has diversity jurisidiction over some plaintiffs claims for vacation pay under 28 U.S.C. §1332 and exercises its pendent jurisdiction over the remaining claims for vacation.

(7) Plaintiffs are not entitled to receive vacation pay from defendants since they have received the vacation benefits which they earned while employed at Ortner in 1986 and early 1987 and have therefore not sustained any damages.

IT IS SO ORDERED.

/s/ Carl B. Rubin,
Chief Judge
United States District Court

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered, that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries,

for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries. It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance. It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

§ 1022. Plan description and summary plan description

(a) (1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b) [29 USCS § 1024(b)]. The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1) [29 USCS §1024(b)(1)].

(2) A plan description (containing the information required by subsection (b)) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 104(a)(1) [29 USCS §1024(a)(1)]. Any material modification in the terms of the plan and any change in the information described in subsection (b) shall be filed in accordance with section 104(a)(1)(D) [29 USCS §1024(a)(1)(D)].

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the

provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act [29 USCS §1133]).

§ 1102. Establishment of plan

(a) Named fiduciaries. (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this title, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan. Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objective of the plan and the requirements of this title,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 405(c)(1) [29 USCS §1105(c)(1)]),

(3) provide a procedure to amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Optional features of the plan. Any employee benefit plan may provide—

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 405(c)(1) [29 USCS §1105(c)(1)], may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violationn of 105(c) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or

(B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l).